82-275

No.

Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

TERRI ANN MIENER, by and through her next friend and parent, Clyde J. Miener,

*Petitioner,*

v.

STATE OF MISSOURI, *et al.*,

and

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERT J. HALLER
STEVEN L. LEONARD
HALLER, LEONARD & TRIPP, P.C.
7751 Carondelet, Suite 600
Clayton, Missouri 63105
(314) 725-5253

*Attorneys for Petitioner Terri Ann Miener by and through her next friend and parent, Clyde J. Miener*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTIONS PRESENTED

I. Whether the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et. seq.*, (EAHCA) allows a remedy of money damages for a failure to provide an appropriate education to those handicapped children who fall within its scope.

II. Whether Petitioner's Complaint filed in the District Court below, seeking relief in the form of compensatory education services, constitutes a prayer which is indistinguishable from a request for money damages and as such cannot be raised against the State of Missouri due to its Eleventh Amendment immunity.

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit which was entered on February 4, 1982 and rehearing denied by order of the Court dated May 20, 1982.

### CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 673 F.2d 969 (8th Cir. 1982) and is printed in Appendix A hereto, *infra*, p.p. A-1. The Memorandum Opinions of the United States District Court for the

Eastern District of Missouri are reported at 498 F.Supp. 944 (E.D.Mo. 1980) and 498 F.Supp. 949 (E.D.Mo. 1980) and are printed in Appendices B and C hereto, *infra* p.p. A-29 and A-39.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 4, 1982. Mr. Justice Blackmun granted an extension of time to file a Writ of Certiorari, to and including June 4, 1982. The same day as Justice Blackmun's order, April 27, 1982, the Eighth Circuit Court of Appeals granted the Special School District of St. Louis County, Missouri, Respondents herein, until May 11, 1982 in which to file a Petition for Rehearing. Those Respondents submitted their Petition for Rehearing, which was denied on May 20, 1982, rendering the decision of the lower Court final.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XI, Constitution of the United States:

> "The Judicial power of the United States shall not be construed to extend to any suit in law of equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

**20 U.S.C. § 1415 (1976):**

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsec-

tion (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e)(1)A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, ex-

cept that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

**29 U.S.C. § 794 (Supp. 1980):**

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits, of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

## STATEMENT OF THE CASE

Petitioner, Terri Ann Miener, is a handicapped child having rights to a free and appropriate education under the Education-For All Handicapped Children Act, 20 U.S.C. § 1401, *et. seq.* [EAHCA]. She voluntarily entered the facilities of the Missouri Department of Mental Health in June of 1977. She was removed to a private facility in April of 1980. During this period of residential placement in State facilities, Petitioner alleged in her Complaint that she was deprived of her rights to education under EAHCA, among other laws, by both the State of Missouri and the Special School District of St. Louis County. She prosecuted her cause of action under EAHCA, the Rehabilitation Act, 29 U.S.C. § 794, and the Civil Rights Act, 42 U.S.C. § 1983.

Respondents herein are the State of Missouri, its Department of Mental Health and Department of Elementary and

Secondary Education, the State Board of Education, and various officers and agents of these state agencies and departments.[1] Respondents also include the Special School District of St. Louis County, its Board of Education, and various members of that Board.[2]

In the trial court below, Petitioner sought, *inter alia*, declaratory relief, a preliminary injunction for placement in an appropriate educational setting, a permanent injunction to that same end, compensatory education services and, in addition, money damages. Appendix D, *infra*, p.p. A-46. The trial court below refused the preliminary injunction on October 16, 1979, and set the case for trial at a later date. On January 25, 1980, on the motion of the State of Missouri, the trial court sustained in part and denied in part their Motion to Dismiss. Appendix B,

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[1] The full list of Respondents referred to herein collectively as the State of Missouri Respondents is: The State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri; Department of Mental Health of the State of Missouri, Joe L. Winter, Commissioner of the Department of Mental Health of the State of Missouri; Paul R. Ahr, Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; and Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital, and the Missouri State Board of Education.

[2] The full list of Respondents referred to herein collectively as the Special School District Respondents is: Special School District of St. Louis County, Missouri; Board of Education of Special School District of St. Louis County, Missouri; and Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri.

*infra,* p.p. A-29. Thereafter, a Stipulation of Partial Settlement was approved by the Court and, thereby, Petitioner's request for permanent injunctive relief for the purpose of placement in an appropriate educational setting was dismissed. However, the question of other forms of relief requested by Petitioner in her Complaint, *e.g.*, her request for compensatory education, remained a part of her case. On September 19, 1980, on another Motion to Dismiss by the State of Missouri, the trial court dismissed Petitioner's remaining claims. Appendix C, *infra,* p.p. A-39. Petitioner appealed to the U.S. Court of Appeals for the Eighth Circuit.

After oral argument and lengthy deliberations, the Circuit Court of Appeals issued its decision of February 4, 1982. Appendix A, *infra,* p.p. A-1. Respondent, Special School District's Motion for Rehearing or for Rehearing *En Banc,* was overruled on its merits on May 20, 1982.

On July 12, 1982, the Special School District of St. Louis County, Missouri and its Board of Education and certain board members filed their Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals. That case was docketed in this Court as Number 82-61.

## REASONS FOR GRANTING THE WRIT

**I. Whether The Education For All Handicapped Children Act, 20 U.S.C. § 1401, *et. seq.* [EAHCA] Allows A Remedy Of Money Damages For A Failure To Provide An Appropriate Education To Those Handicapped Children Who Fall Within Its Scope.**

> "It is in the national interest that the Federal Government assist State and Local efforts to provide programs to meet the education needs of handicapped children in order to assure equal protection of the law."

Pub. L. No. 94-142, § 3(b)(9). *See,* Historical Note, 20 U.S.C.A. § 1401.

> "It is the purpose of this Act to assure that all handicapped children have available to them within the time period specified in § 612(2)(b), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States in all localities to provide for the education of all handicapped children and assess and assure the effectiveness of efforts to educate handicapped children."

Pub. L. No. 94-142, § 3(c). *See,* Historical Note, 20 U.S.C.A. § 1401.1.

The Congressional Findings and Congressional Declaration of the Purpose foregoing, indicate the importance to the welfare of the nation which Congress attached to the legislation which they entitled the Education for All Handicapped Children Act. The broad scope of the statute is framed in such a manner as to *protect* handicapped children and *guarantee them* equal protection of laws.

> "It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of laws."

S. Rep. No. 168, 94th Cong., 1st Sess. 13 (1975). Thus, Congress has found the education of the handicapped, and their equal protection under the laws, to be of vital interest to the nation. Congress created an extensive framework to assure that a full panoply of due process rights are guaranteed to the handicapped and their parents to provide *certainty* that the handicapped would be appropriately educated by each and every state. 20 U.S.C. § 1415. To this end, many millions of dollars of federal assistance have been provided to the states in a continuing federal program of enhancement of handicapped education programs.

This important statute has reached this Court before. *Board of Education of the Hendrick Hudson Central School District Bd of Ed., Westchseter County* v. *Rowley,* ____ U.S. ____, 50 U.S.L.W. 4925, June 28, 1982. In *Rowley,* this Court was called upon to define, within a particular factual setting, the statutory term "appropriate education." *Id.* at ____, 50 U.S.L.W. at 4928. The statute has received considerable attention in the District Courts. There are numerous decisions at that level which deal with the damages question presented herein. However, at circuit court level, only the Eighth Circuit, in the present case, and the Seventh Circuit have reviewed the question of the availability of damages under EAHCA. *Miener* v. *State of Missouri,* 673 F.2d 969 (8th Cir. 1982); *Anderson* v. *Thompson,* 658 F.2d 1205 (7th Cir. 1981).

These decisions, in principal, are not in accord. While the Eighth Circuit relied upon the Seventh Circuit's decision in *Anderson,* it refused to mitigate its prohibition on money

damages as did the Seventh Circuit. *Anderson* set out two general exceptions to its rule of forbiding money damages under EAHCA. That court stated that if the physical health and safety of the child was endangered by its current placement, the Federal Courts had authority to recompense parents for the cost of alternative educational placements made unilateraly by the parent for the child's protection. Additionally, *Anderson* held that acts of bad faith by the school district, accomplished in an egregious fashion, would also give rise to a cause of action for money damages. 658 F.2d at 1213-14. The Eighth Circuit rejected these two exceptions as inappropriate under the law and as unsupported by Petitioner's Complaint.

It is in this difference in the opinions of these two Circuit Courts by which Petitioner suffers. First, Petitioner pled that she had "been the subject of attacks and beatings by her fellow residents and [had] also been the object of injuries suffered because of the negligent acts of the medical and custodial staff of the hospital." Paragraph 53 of Petitioner's Complaint, Appendix D, *infra,* p.p. A-59. Petitioner also pled that Respondents had "failed to provide . . . a safe and secure facility . . .", paragraph 56 of Petitioner's Complaint, Appendix D, *infra,* p.p. A-59, and that Petitioner was "injured by unknown persons while a resident of the St. Louis State Hospital as a direct and approximate result of the failure of the aforesaid Defendants to provide a safe and secure facility . . ." paragraph 57 of Petitioner's Complaint, Appendix D, *infra.* p.p. A-59.

Second, Petitioner alleged in paragraph 36 of her Complaint that despite her father's "numerous attempts to resolve [the individual education program problems] through the state agencies herein named as Defendants . . . it would be a *useless* and *unconscionable* delay to require Plaintiffs to exhaust the administrative procedures as established by the State of Missouri, in the face of the State's *continual inaction.*" Appendix D, *infra.* p.p. A-54 (emphasis added). Additionally, at paragraph 39

of her Complaint, Petitioner alleges that Respondents "have refused to allow [her] to fully participate in their programs . . . [in a manner which is] *discriminatory, arbitrary, capricious, unreasonable and without just cause* . . .." Appendix D, *infra,* p.p. A-56 (emphasis added).

By these averments, Petitoner's allegations come within the two exceptions set out in *Anderson* but rejected by the court below. This split of authority between the Circuits is in need of resolution by this Court.

Moreover, it is clear that all forms of damages were intended by Congress under this enactment. The statute clearly states, "In any action brought under this paragraph, the court . . . shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). This broad grant of the remedial power under [EAHCA] is amplified and made clear by its legislative history. "Such action may be brought . . . in a District Court of the United States . . . [which] *shall grant all appropriate relief . . . without regard to amount in controversy.*" (Emphasis added.) Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 455, 94th Cong., 1st Sess. 50 (1975). Thus, it can be seen that *all* forms of relief are authorized. Moreover, if money damages were not contemplated under EAHCA then the words of the explanatory statement of the Conference Committee, "without regard to amount in controversy", would be surplusage and meaningless. It is obvious that Congress intended that money damages be available under EAHCA.

The foregoing amply demonstrates that an important area of Federal statutory law has come under differing analysis by the Circuit Courts. Petitioner strongly urges that the court below has erred in its refusal to allow the award of monetary damages pursuant to an EAHCA action. Therefore, a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit is appropriate.

**II. Whether Petitioner's Complaint Filed In The District Court Below, Seeking Relief In The Form Of Compensatory Education Services, Constitutes A Prayer Which Is Indistinguishable From A Request For Money Damages And As Such Cannot Be Raised Against The State Of Missouri Due To Its Eleventh Amendment Immunity.**

The Circuit Court below ruled that Petitioner's prayer for compensatory education services did not state a claim for equitable relief, and therefore was barred against the state respondents. This holding is contrary to decisions of this Court and is contrary to the principle of equity relied upon by Petitioner.

It is clear that the Eleventh Amendment does not bar the Federal Court from granting equitable relief against the state if the relief sought is prospective and equitable. *Ex Parte Young,* 209 U.S. 123 (1908). As further defined in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), prospective injunctive relief is not absolutely barred by the Eleventh Amendment, even where that injunction is "not totally without effect on the State's revenue . . .." *Id.* at 667.

There is no clear line dividing the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young.* "[T]he line will not in many instances be that between day and night." *Id.* So long as "the fiscal consequences to state treasuries . . . [are] the necessary result of compliance with decrees which by their terms [are] prospective in nature . . ." a prospective order is proper. *Id.* at 667-68.

Petitioner, in her Complaint, seeks the order of the District Court "to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special education services as defined by the laws of the State of Missouri and by the laws of the United States . . .." Paragraph 3, Appendix D, *infra.* p.p. A-60. It is Petitioner's position that

she states a claim for prospective equitable relief. Her requested relief is not very different from that imposed upon the State of Michigan in *Milliken* v. *Bradley*, 433 U.S. 267 (1977).

> "Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills—reading and speaking—the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment."

*Id.* at 290. *See also, Quern* v. *Jordan*, 440 U.S. 332 (1979).

The relief sought by Petitioner requires the same expenditure of EAHCA funds for Petitioner's education that is already required for the education of any handicapped child. There is no greater burden on the state treasury by this remedy than already imposed by EAHCA.

It is also instructive to note the interpretation of the Office of Civil Rights (OCR), U.S. Department of Education, of Section 504 of the Rehabilitaton Act, one of the acts under which Plaintiff sought her equitable relief. OCR has recently ordered the school district to provide "compensatory, remedial education services for a period of time equal to that period for which appropriate education services were denied . . .." *In re Richard F.*, No. 01-80-1047 (ED OCR June 16, 1980). Thus, the U.S.

Department of Education believes that compensatory education is a proper remedy under the Rehabilitation Act. "The line between the retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief." *Hutto* v. *Finney*, 437 U.S. 678, 686 (1978). Once in equity, Petitioner is entitled to relief appropriate to the facts pled, as supported by the evidence. *Damm* v. *Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1971). The court of equity should not be limited by precise demands for relief.

## CONCLUSION

For all the following reasons, it is respectfully submitted that this Petiton for Writ of Certiorari be granted.

Respectfully submitted,

Albert J. Haller
Steven L. Leonard
HALLER, LEONARD & TRIPP, P.C.
7751 Carondelet, Suite 600
Clayton, Missouri 63105
(314) 725-5253

Attorneys for Petitioner Terri Ann Miener by and through her next friend and parent Clyde J. Miener